IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1225 of 2006
WITH
CRIMINAL APPEAL No. 1186 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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CRIMINAL APPEAL No. 1225 of 2006

DILIP @ HARISH MULJIBHAI VAGHELA - Appellant
Versus
STATE OF GUJARAT - Respondent

CRIMINAL APPEAL No. 1186 of 2006

VINOD @ LADU PIRUJI CHAUHAN - Appellant
Versus
STATE OF GUJARAT - Respondent

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Appearance :
MR ANIL S DAVE WITH MS KRUTI M SHAH
for the Appellant in Criminal Appeal No. 1225 of 2006.
MR SAMIRKHAN A PATHAN WITH MR YOGESH S LAKHANI
for the Appellant in Criminal Appeal No. 1186 of 2006.
MR KP RAVAL, ADDITIONAL PUBLIC PROSECUTOR for the Respondent.
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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 26/09/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. These appeals are preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short, "the Code") against the judgment and order rendered by the learned Additional Sessions Judge, Court No. 7, Ahmedabad City in Sessions Case No. 1 of 2005. The learned Additional Sessions Judge, by judgment and order dated 19th May, 2006, convicted both the appellants under Section 376 (2) (g) read with Section 34 of the Indian Penal Code, 1860 (for short, "the IPC") and imposed sentence of rigorous imprisonment for 12 years on each of the appellants. In addition, the learned Judge imposed fine of Rs. 50,000/- (Rupees Fifty Thousand Only), in default, sentence of rigorous imprisonment for 3 years on original accused No. 1, who is the appellant in Criminal Appeal No. 1225 of 2006, and fine of Rs. 25,000/- (Rupees Twenty Five Thousand Only), in default, rigorous imprisonment for 1 year on original accused No. 2, who is the appellant in Criminal Appeal No. 1186 of 2006. For the sake of brevity and convenience, the appellant in Criminal Appeal No. 1225 of 2006 and the appellant in Criminal

Appeal No. 1186 of 2006 are referred to as "appellant-accused No. 1" and "appellant-accused No. 2", respectively, in order of their arraingment as accused Nos. 1 and 2 respectively in Sessions Case No. 1 of 2005. As both these appeal arise out of same judgment and order, they are being disposed of by this common judgment.

2. In view of law laid in **Bhupinder Sharma Vs. State of Himachal Pradesh, (2003) 8 SCC 551**, the name of the victim is not indicated in this judgment.

3. The short facts giving rise to the present appeal are as under:-

As per the prosecution case, both the appellants i.e. Dilip @ Harish Muljibhai and Vinod @ Ladu Piruji Chauhan had a common intention of committing an act of sexual intercourse with the prosecutrix, who was deaf and dumb and mentally retarded. The prosecutrix, who is the resident of Ratnasagar Society, Meghaninagar, had gone to purchase curd from the shop situated nearby her house. The accused had abducted the girl on the motor-cycle having registration No. GJ-1-D-E-307 which was owned by appellant-accused No. 1. The prosecutrix was taken to the office of Geological Department at Meghaninagar Court Compound which is a secluded place and both the appellants committed rape on her one after another. The complaint was given on

02-09-2004.

4. On completion of the investigation, the accused were subsequently arrested and the charge-sheet was filed against the appellants for the offence punishable under Section 376 (2) (g) read with Section 34 IPC. As the case was exclusively triable by the Sessions Court, it was made over for trial before the learned Additional Sessions Judge, Ahmedabad City by the learned Metropolitan Magistrate under Section 209 of the Code. The learned Judge framed necessary charge against the appellants at Exh. 4. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, has examined the witnesses as per the details given below:

(i) Mohamadyunus Abbasbhai Mansuri as PW-1, at Exh. 9;

(ii) Nageshgkumar Ramkishore Jadhav as PW-2, at Exh. 13;

(iii) Dhirubha Mavjibhai as PW-3, at Exh. 16;

(iv) Imrankhan Inayatkhan Pathan as PW-4, at Exh. 17;

(v) Dr. Ajay Purshottamdas Chauhan as PW-5, at Exh. 19;

(vi) Dr. Pravinkumar Kantilal Patel as PW-6, at Exh. 22;

(vii) Dr. Rajendrakumar B. Joshi as PW-7, at Exh.

24;

(viii) Hasmukhbhai Amarsinh Dhagiya as PW-8, at Exh. 29;

(ix) Dr. Anilkumar Madhukant Mehta as PW-9, at Exh. 31;

(x) Malaben Vijaysinh Rajput as PW-10, at Exh. 42;

(xi) The prosecutrix as PW-11, at Exh. 43;

(xii) Vijaybhai Rajendrabhai Tadvi as PW-12, at Exh. 50; and

(xiii) Parixitaben Vijaybhai Rathod as PW-13, at Exh. 53.

The following documentary evidence relied upon by the prosecution is produced *vide* list Exh. 21:

(i) Complaint dated 02-09-2004, at Exh. 14;

(ii) Report dated 02-09-2004 under Section 157 of the Code, at Exh. 15;

(iii) Request letter dated 02-09-2004 from Assistant Commissioner of Police to Deaf and Dumb School, at Exh. 54;

(iv) Letter dated 03-09-2004 addressed to the Assistant Commissioner of Police by the Principal of Training College for teacher of Deaf and Dumb, at Exh. 55;

(v) Letter dated 04-09-2004 addressed to the Superintendent, Mental Health Hospital by the Assistant Commissioner of Police, at

Exh. 56;

(vi) Place of offence pointed out by appellant-accused No. 1 on 05-09-2004, at Exh. 57;

(vii) *Panchnama* drawn on 04-09-2004 of the prosecutrix revealing details of the accused and pointing out photographs, at Exh. 51.

(viii) Recovery of under-pant of accused on 06-09-2004, at Exh. 58;

(ix) Form dated 08-09-2004 for identification for DNA profile, at Exh. 36;

(x) Form dated 08-09-2004 for identification for DNA profile of appellant-accused No. 2, at Exh. 37;

(xi) Form dated 08-09-2004 for identification for DNA profile of prosecutrix, at Exh. 38;

(xii) *Panchnama* dated 08-09-2004 of records of the statement of the prosecutrix with the aid of Deaf and Dumb School, at Exh. 18;

(xiii) Letter dated 06-09-2004 to know mental condition of the prosecutrix, at Exh. 20;

(xiv) Despatch note dated 17-09-2004, at Exh. 32;

(xv) Original of despatch note dated 17-09-2004, at Exh. 59;

(xvi) Receipt dated 10-09-2004 of *muddamal*, at Exh. 60;

(xvii) Receipt dated 10-09-2004 of *muddamal*, at Exh. 33;

(xviii) Despatch note dated 21-11-2004, at Exh. 34;

(xix) Receipt dated 22-11-2004 of *muddamal*, at Exh. 35;

(xx) Opinion dated 10-11-2004 of FSL, at Exh. 61;

(xxi) Medical Certificate dated 06-10-2004 of the prosecutrix, at Exh. 23;

(xxii) Statements dated 17-09-2004 of appellant-accused Nos. 1 and 2 respectively, at Exhs. 25 and 27;

(xxiii) Letter dated 27-12-2004 of Director of DNA profile of FSL addressed to the Police Inspector, Meghaninagar in respect of opinion of DNA Test Report, at Exh. 40;

(xxiv) DNA Test Report itself, at Exh. 42;

(xxv) Letter dated 06-09-2004 addressed to the Executive Magistrate by the Assistant Commissioner of Police, Women Police Station for Test Identification Parade, at Exh. 10;

(xxvi) *Panchnama* dated 06-09-2004 of Test Identification Parade, at Exh. 11;

(xxvii) Permission dated 06-09-2004 to keep the teacher of Deaf and Dumb School present during T.I. parade on account of disabled condition of the prosecutrix, at Exh. 12;

(xxviii) Medical Certificate of appellant-accused No. 1- Dilip, at Exh. 26;

(xxix) Medical Certificate of appellant-accused No. 2- Vinod, at Exh. 28;

(xxx) Identification Form for DNA Profile, at Exh. 37;

(xxxi) Letter addressed to the Videography Expert, Crime Branch by the Assistant Commissioner of Police, Women Police Station, at Exh. 62;

(xxxii) Letter addressed to the Assistant Commissioner of Police, Women Police Station by the Superintendent, Mental Health Hospital; at Exh. 68;

(xxxiii) Letter of Superintendent, Mental Health Hospital, specifying discharge of the

prosecutrix, at Exh. 64;

(xxxiv) Photograph of appellant-accused No. 1 identified by the prosecutrix during the *panchnama,* at Mark-A;

(xxxv) Closure pursis from the prosecution, at Exh. 67, etc.

5. After the conclusion of trial, further statement of the appellants under Section 313 of the Code were recorded. In their further statements, the appellants have denied their involvement in the commission of offence. The appellants had examined two Defence Witnesses, namely DW-1 Pushpaben Chandrakant Vyas *vide* Exh. 70 and DW-2 Davendrabhai M. Pathak *vide* Exh. 71.

6. After going through the entire gamut of oral deposition and documentary evidence, the learned Additional Sessions Judge held that the prosecution has established beyond reasonable doubt that the prosecutrix is a mentally challenged girl and on account of mental retardness, her mental age was less than 16 years on the date of incident. The learned Judge further held that appellant-accused No. 1 had committed an act of sexual intercourse along with appellant-accused No. 2 in furtherance of common intention, and, therefore, the appellants were liable to be convicted for the offence punishable under Section 376 (2) (g) of IPC, for which the learned Judge imposed punishment, as referred to hereinbefore. The learned Judge held that as the

appellants had exploited the situation having known the mental condition of the girl and, thereafter, committed rape on her, they are liable to be convicted under Section 376 (2) (g) of IPC. The learned Judge further held that the prosecution has proved the case beyond reasonable doubt and as there was no infirmity in the evidence adduced by the prosecution, the appellants are liable to be convicted.

7. Mr. Anil S. Dave, learned Counsel for appellant-accused No. 1, submitted that the conviction and sentence imposed by the learned Judge is erroneous and in flagrant violation of the principles of appreciation of evidence in criminal trial and, therefore, the order of sentence requires to be quashed and set aside. The learned Judge has not appreciated the evidence adduced before her in proper perspective. Even the charge framed against appellant-accused No. 1 was defective and his examination under Section 313 of the Code was not in conformity with the law and, therefore, prejudice was caused to appellant-accused No. 1 and hence, the appeal requires to be admitted and the order passed by the learned Judge be quashed and set aside. The learned Judge has overlooked the compromise arrived at between the family of the victim and appellant-accused No. 1. Both the families had agreed to tie a marital knot during the pendency of the trial and the application to that fact was also tendered. Considering the facts and circumstances of the case,

the learned Judge ought to have entertained the compromise between appellant-accused No. 1 and the victim, and could have thrashed out the entire problem at the stage of trial, but the same was not considered by the learned Judge. The learned Judge ought to have held that there were serious loop-holes in the investigation and more particularly, the recording of videography and CDs of which the Court had taken notice. The Court ought to have examined the videographer but the same was not done and it has caused serious prejudice to appellant-accused No. 1. The learned Judge ought to have taken into account the behaviour of the prosecutrix and not only the mental retardness of the prosecutrix. The Trial Court has examined two Defence Witnesses, namely, DW-1 Pushpaben Chandrakant Vyas *vide* Exh. 70 and DW-2 Davendrabhai M. Pathak *vide* Exh. 71. Both the witnesses categorically admitted that the prosecutrix was not mentally retarded. She was a normal human being with all the understanding of normal human being of a particular age. Thus, the Trial Court has wrongly discarded the evidence of these two witnesses which has resulted into serious prejudice to appellant-accused No.1. It has been contended by the learned Advocate that if the evidence of the prosecutrix, which has been relied upon, is evaluated in proper perspective in peculiar facts and circumstances of the case, it becomes absolutely clear that Section 376 (2) (g) of IPC could not be attracted against appellant-accused No. 1. The learned Judge ought to have held that as the

prosecution has miserably failed to establish the entire link connecting appellant-accused No. 1 with the commission of offence, appellant-accused No. 1 cannot be convicted for the offence punishable under Section 376 (2) (g) of IPC. Thus, the learned Advocate submitted that on perusal of deposition adduced by prosecution witnesses as well as the documentary evidence, the prosecution has not established the involvement of appellant-accused No. 1 in the commission of offence. The learned Advocate further submitted that the prosecutrix was of 22 years of age, but the learned Judge, while considering the evidence on record of the case and the expert opinion of PW-5 Dr. Ajay Chauhan, held that she was having mental retardation and she was behaving like a girl of 10 to 12 years of age. Even her I.Q. was not considered in proper perspective by the Clinical Psychologist, who had examined the victim. Thus, considering the aforesaid facts and circumstances of the case, the learned Advocate for appellant-accused No. 1 submitted that the evidence which was adduced before the learned Judge was not considered or evaluated in proper perspective and, therefore, appellant-accused No. 1 is required to be exonerated. The learned Advocate further contended that the learned Judge ought to have taken into consideration the medical report produced in the course of trial and held that even the biological test conducted on the prosecutrix is not foolproof and appellant-accused No. 1 could not have been said to be the father of the child conceived by the

prosecutrix. The learned Advocate, in the alternative, submitted that if the evidence adduced by the prosecutrix is believed, in that event, the sentence imposed by the learned Judge on appellant-accused No. 1 is too harsh and, therefore, the sentence imposed on appellant-accused No. 1 is required to be reduced.

8. Mr. Yogesh S. Lakhani, learned Counsel representing appellant-accused No. 2, submitted that considering the nature of evidence adduced before the learned Judge, appellant-accused No. 2 has not committed the offence under Section 376 (2) (g) read with Section 34 of IPC and, therefore, the learned Judge ought to have acquitted appellant-accused No. 2. The learned Advocate submitted that the prosecutrix identified appellant-accused No. 2 during the course of the trial and, therefore, the entire case of the prosecution is totally nullified. The learned Advocate further submitted that, as per the prosecution case, the prosecutrix was mentally unstable, but in fact, the prosecutrix cannot be said to be mentally unstable or deaf and dumb and, therefore, she should not be termed as mentally retarded. The learned Advocate further submitted that the prosecutrix was having the capacity to understand the human feelings, but the said fact was not appreciated by the learned Judge and appellant-accused No. 2 was wrongly convicted for the offences punishable under Section 376 (2) (g) of the IPC. Even the DNA Report, as per the submission of the

learned Advocate, does not match the blood-group of appellant-accused No. 2 and, therefore, on that ground the learned Judge ought to have acquitted appellant-accused No. 2. The learned Advocate submitted that appellant-accused No. 2 was sent for medical examination after his arrest by the police and, therefore, the medical examination was conducted during the period in which he was in police custody. The history given before the Doctor by appellant-accused No. 2 when he was in custody ought not to have been taken into consideration by the learned Judge in convicting appellant-accused No. 2 as the same would be hit by Section 26 of the Indian Evidence Act, 1872. The learned Advocate submitted that there was no other independent material or the evidence on record of the case to connect appellant-accused No. 2 with the commission of offence and, therefore, the benefit of the same is required to be given in favour of appellant-accused No. 2 and, appellant-accused No. 2 is required to be acquitted forthwith in the matter.

9.1 Initially, when Criminal Appeal No. 1226 of 2006 was placed for admission hearing on 24-08-2006, on the request of Ms. Kruti M. Shah, learned Advocate for appellant-accused No. 1, it was adjourned to 31-08-2006. On 31-08-2006, Record and Proceedings were called for by 01-09-2006 and the matter was again listed for admission hearing on 01-09-2006. However, it was adjourned to the next date i.e. 02-09-2006. On 02-09-2006, Mr. Anil S. Dave, learned Counsel for

appellant-accused No. 1, was heard at length and, thereafter, as per the desire of the learned Counsel for appellant-accused No. 1, the matter was adjourned to 07-09-2006. A detailed order was passed on 07-09-2006 for hearing the matter peremptorily on 11-09-2006. On 11-09-2006, the learned Counsel for appellant-accused No. 1 remained present and proceeded with the matter and the arguments of the learned Counsel for appellant-accused No. 1 were heard in detail and at length and subsequently, the matter was adjourned for pronouncement of the judgment.

9.2 So far as Criminal Appeal No. 1186 of 2006 is concerned, it was noticed that it was filed against the same order and judgment under challenge in Criminal Appeal i.e. No. 1225 of 2006. As Criminal Appeal No. 1225 of 2006 was heard first because of the presence of the learned Counsel on the dates of its hearing, Mr. Yogesh S. Lakhani, learned Advocate for appellant-accused No. 2, was requested, when Criminal Appeal No. 1186 of 2005 came up for hearing, to make submissions on conclusion of the submissions by Mr. Dave, learned Counsel for appellant-accused No. 1. Mr. Lakhani, learned Counsel for appellant-accused No. 2, accordingly, made his submissions and concluded his submissions on 19-09-2006 and the judgment in this mater was also reserved.

9.3 As discussed above, Criminal Appeal No. 1225 of 2006 was heard first. Not only that, it was heard

at length at the admission stage by calling for the Record and Proceedings of the case, and, therefore, considering the facts and circumstances of the case, we did not call upon the learned Additional Public Prosecutor representing the State to make the submissions. Whereas in Criminal Appeal No. 1186 of 2006, keeping in mind the facts and circumstances in which appellant-accused No. 2 was implicated, we asked Mr. K. P. Raval, learned Additional Public Prosecutor, to explain the position of the State as a respondent vis-a-vis the arguments of the learned Counsel for appellant-accused No. 2. Accordingly, the learned Public Prosecutor has argued in the matter.

10. In his arguments limiting to the role of appellant-accused No. 2, Mr. K. P. Raval, learned Additional Public Prosecutor for the respondent-State, submitted that, as argued by the learned Counsel for appellant-accused No. 2, though appellant-accused No. 2 was identified only during the course of trial and not in the Identification Parade, the fact that she was mentally retarded and, therefore, she cannot be expected to identify as a normal human being, needs consideration, especially when the experts had opined that she possessed mental age of 10 - 12 years though she was physically above 21 years and that her mood wavered off and on. The learned Additional Public Prosecutor emphasised that what was important to note is that the prosecutrix did identify appellant-accused No. 2 as another

person who committed rape on her and considering this identification, the learned Judge rightly convicted appellant-accused No. 2. The learned Additional Public Prosecutor argued that as none of the appellants-accused were under pressure from the investigating agency in any manner, they were free to say whatever they thought fit at the time of recording the history before the Doctor. The statement given before the Doctor can be relied upon as it provides necessary corroboration to the prosecution case and, therefore, the statement given before the Doctor cannot be discarded. The learned Additional Public Prosecutor submitted that even though ample opportunity was given to appellant-accused No. 2 when incriminating material was put to him in the statement recorded under Section 313 of the Code, the same was not availed of by appellant-accused No. 2. The learned Additional Public Prosecutor further submitted that, considering all the aspects of the matter, the learned Judge convicted appellant-accused No. 2, and as appellant-accused No. 2 was rightly convicted, he prayed that the same may be confirmed by this Hon'ble Court.

11. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have perused the entire oral deposition and the documentary evidence which were called for and perused the detailed and elaborate reasons

assigned by the learned Judge in her judgment rendered in the present appeals.

12. We have taken into consideration the submissions canvassed by the learned Counsel on behalf of the appellant-accused No. 1. As per the prosecution case, the prosecutrix was deaf and dumb and having mental retardness. PW-5 Dr. Ajay Purshottamdas Chauhan, examined *vide* Exh. 19, had examined the prosecutrix. He had prepared separate file of the prosecutrix and the certificate was issued *vide* Exh. 20 after careful examination of the prosecutrix. As per the oral deposition of PW-5 Dr. Ajay Chauhan, the girl was admitted by her mother and one male person in the hospital and the girl explained everything with the sign language and the information was interpreted with the help of a teacher of deaf and dumb persons. The girl was examined by the Clinical Psychologist at the hospital and she had a mild degree of mental retardation with pregnancy of 28 - 29 weeks. In neurological examination, she was found to have reception, but she was unable to speak except "A" and "AH" and, therefore, it was concluded that she was mute (dumb). The decision-making ability and other abilities and capacity of the prosecutrix was 40% to 50% below the normal level. On examination of the prosecutrix, the Doctor found that the mental retardness could be either congenital because of some trauma or infection developed by the girl later on, but it was found by him that right from the childhood, she suffered a

lot. It is also deposed by the Doctor that logical thinking and other functions were stultified to a considerable extent. The deposition adduced by Dr. Pravinkumar Kantilal Patel, working as C.M.O. at the Civil Hospital, *vide* Exh. 22 is also relevant and the same provides necessary corroboration to the prosecution case. In view of the history of alleged rape given by the mother, the prosecutrix was admitted in the Gynecology Unit and subsequently, after the examination and DNA test, she was also referred to Psychiatric Unit and examined for the determination of her mental condition. In order to conduct DNA test, her blood sample was taken and clinically, it was found that she had a pregnancy of 29 - 30 weeks and medical termination of pregnancy was not possible. The Psychiatric Unit had opined that her I.Q. was 46% than that of a normal person. The certificate produced at Exhs. 20 - 23 were also referred to in the deposition adduced by PW-5 Dr. Ajay Chauhan. On perusal of the judgment rendered by the learned Additional Sessions Judge, it is borne out that the prosecutrix was also examined preliminarily and when it was not found possible to administer the oath to the prosecutrix, she was called on the next date and her demeanour during the deposition on the next date has been elaborately discussed by the learned Judge. It has also been observed by the learned Judge that during her examination, she had left the Court without the permission and simply walked away from the Court to attend the natural call and came back on her own. It

is further observed that the prosecutrix behaved almost like a child and considering the limited understanding, the defence could not take the denial of a positive case put up by the prosecutrix. Even the limited understanding of the prosecutrix is also reflected in the deposition adduced by PW-13 Parixitaben Vijaybhai Rathod at Exh. 53, who was heading Women's Cell and as per her deposition, it was all the more difficult to get the things extracted from her. Even she lost her temper during the course of investigation. It is observed by the learned Judge that if one watches the Video CD, which was produced by the prosecution, her behaviour, manner of walking and her explanation cannot be looked at in isolation. Thus, with regard to mental retardness, there was ample evidence on record of the case and as the prosecutrix was deaf and dumb and mentally retarded, it was held by the learned Judge that her age could at the most be considered of 9-12 years and it is also observed by the learned Additional Sessions Judge that the I.Q. of the girl was 45% - 50%, as per the expert opinion, at the time of the incident, and as the reasoning given by the learned Judge, which is based on the oral deposition and the documentary evidence adduced by the prosecution, is unassailable, we hereby uphold the finding. With regard to the involvement of the appellant-accused No. 1 in the commission of offence, the prosecution has adduced ample evidence to indicate his involvement in the commission of the offence. The prosecutrix had pointed out at the

motor-bike of appellant-accused No. 1 and identified appellant-accused No.1 when photograph from the family album of appellant-accused No.1 was shown to her. The place of offence was pointed out by appellant-accused No. 1 which is at Exh. 57. Even appellant-accused No. 1 gave the history before the Doctor when he was sent for medical examination *vide* Exh. 25. It is corroborated by the certificate issued by the Doctor in respect of the prosecutrix *vide* Exh. 23 that appellant-accused No. 1 had sexual intercourse with the prosecutrix twice. That she was carrying the foetus of 28 - 29 weeks is also reflected in the certificate issued by the Civil Hospital. Thus, the aforesaid documents indicate the involvement of appellant-accused No. 1 in the commission of offence. Even the statement given by appellant-accused No. 1 under Section 313 of the Code is relevant as appellant-accused No. 1 does not dispute the fact that the history was recorded by the Doctor on 06-09-2004 when appellant-accused No. 1 was alone with the Doctor. The prosecution has also proved the DNA profiling *vide* Exhs. 36 and 38 along with the new born female child of the prosecutrix *vide* Exh. 39 and the fact that appellant-accused No. 1 was biological father of newly born child of the prosecutrix is also proved by the prosecution by placing reliance on the documentary evidence and the oral deposition. DNA profiling, as per the detailed discussion in the judgment, were prepared with the help of Polymer Chain Reaction (PCR) based method. In view of the oral deposition and the documentary

evidence produced by the prosecution, the prosecution has established the inextricable involvement of appellant-accused No. 1 in the commission of crime under Section 376 (2) (g) of the IPC. The hapless deaf and dumb girl was exploited by appellant-accused No. 1 and after taking advantage of her disability, he ravished her and, therefore, the learned Judge has rightly imposed the punishment.

13. We have also considered the submissions advanced by Mr. Lakhani, learned Counsel for appellant-original accused No. 2, and by Mr. Raval, learned Additional Public Prosecutor *qua* appellant-accused No. 2. Taking into consideration the entire gamut of oral deposition and the documentary evidence, it is true that appellant-accused No. 2 was sent for medical examination after his arrest and the history given by him can be said to be during the period in which he was in police custody. However, on overall perusal of deposition of prosecutrix PW-11 at Exh. 43, PW-10 Malaben Vijaysinh Rajput at Exh. 42, the complaint dated 02-09-2004 produced at Exh. 14 as well as the deposition adduced by the Investigating Officer PW-12 Vijabhai Rajendrabhai Tadvi at Exh. 50, it becomes abundantly clear that appellant-accused No. 2 was equally involved along with appellant-accused No. 1 in the commission of offence. It is unfortunate that the hapless girl, who was not only deaf and dumb but mentally retarded, was taken advantage of her disability and both the accused ravished the girl. The history given to the

Doctor and produced *vide* Exh. 24 as well as deposition of prosecutrix PW-11 at Exh. 43 and PW-10 Malaben Vijaysinh Rajput at 42 provide necessary corroboration to the prosecution case indicating the involvement of appellant-accused No. 2 in the commission of offence under Section 376 (2) (g) of the IPC. Even under Section 313 of the Code, when his further statement was recorded, the accused had more than enough opportunity to put forth his say with regard to any or all the circumstances regarding his involvement or otherwise in the commission of offence, but instead of properly utilising the opportunity, which is provided by law, appellant-accused No. 2 preferred to merely deny his involvement and did not offer any explanation which could help him to show that he was innocent. Thus, the history recorded by the Doctor of appellant-accused No. 2 is not required to be read in isolation but along with other oral deposition and documentary evidence so as to consider the entire link is established by the prosecution to prove the involvement of appellant-accused No. 2 in the commission of offence. On overall perusal of evidence, appellant-accused No. 2 cannot, in our view, wriggle out from the offence of rape, more particularly when provisions of Section 376 (2) (g) are invoked.

14. On overall perusal of Section 376 (2) (g) of the IPC, it becomes clear that whoever commits gang rape shall be punished with rigorous imprisonment for

a term which shall not be less than ten years but which may be for life and shall also be liable to fine. Further, as per *Explanation 1* provided in Section 376, it is clear that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Thus, Section 376 (2) (g) makes it abundantly clear that when an offence of rape is committed by more than one person in a group of persons, each one of them would be equally liable with the other accused.

15. The discrepancies and infirmities pointed out by the learned Counsel representing the appellants, in our view, are of a minor nature and they would pale into insignificance once the factum of commission of rape is established. In catena of decisions, the Apex Court has taken the view that in the offence under Section 376 of IPC, the Courts should not look much for corroborative evidence unless shaken in other respects. The evidence of the victim itself should be sufficient to convict the accused. There is ample evidence on the record of the case to establish the involvement of the appellants in the commission of offence. This Court cannot be oblivious to the fact that both the appellants have committed heinous crime of rape on prosecutrix who was mentally retarded and deaf and dumb. Even as per the expert opinion, her mental age was considered as that of 9 - 12 years and she was

not even in a position to speak and she used to speak through the sign language. Thus, the act of rape committed by both the appellants is unpardonable and despicable.

16. In the light of the aforesaid facts and circumstances of the case and considering the entire gamut of oral deposition and the documentary evidence, which has been relied upon by the prosecution, we do not see any reason to interfere with the order passed by the learned Judge convicting both the appellants for the offence under Section 376 (2) (g) of the IPC, as both of them were equally, in our view, responsible for the rape committed on the prosecutrix. Therefore, the present appeals are liable to fail at the admission stage. Hence, we pass the following order:

O R D E R

The appeals are dismissed.

[R. P. DHOLAKIA, J.]

[H. B. ANTANI, J.]

/shamnath